UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

VERTIS, INC.

Employer

Case 22-RC-061844

and

LOCAL-1, AMALGAMATED LITHOGRAPHERS OF AMERICA, GCC/IBT

Petitioner

EMPLOYER'S ANSWERING BRIEF IN OPPOSTION TO UNION'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION ON CHALLENGED BALLOTS AND OBJECTIONS

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I. INTRODUCTION

Vertis, Inc ("Vertis") submits this Answering Brief in Opposition to the Exceptions filed by Local 1, Amalgamated Lithographers of America, GCC/ABT (the "Union"). On December 22, 2011, Administrative Law Judge Raymond Green issued a Decision[1] on Challenges and Objections in which he concluded, among other things, that the Union failed to sustain its burden of proof with respect to 2 challenged ballots and 13 objections which it made and filed in connection with a representation election held at Vertis' Monroe, NJ facility on August 31, 2011. The election recital is a vote tally of 37 in favor of the Union, 35 in favor of no representation, and 2 challenged ballots. In addition to finding that the Union did not produce supporting evidence as to its challenges and objections, Judge Green also concluded that many of the Union's objections were insufficient as a matter of law.

[1] Citations to the Decision of the Administrative Law Judge are designated as "ALJD." Citations to the Transcript of the Hearing shall be cited as "Tr. [page]".

The Union has excepted to the ALJ's Decision on five separate grounds[2]. It claims that:

1. Judge Green erred in concluding that its challenges to the ballots of employees Frank Swercheck and Luisa Diaz must be overruled because there is no evidence in the record that these employees are not supervisors under the Act.
2. The alleged physical conduct of a Vertis representative at a pre-election conference which was not seen or heard by any eligible voter except the Union's observer is sufficient grounds for overturning the election. (Union Objection No. 3).
3. Vertis' repetition of an announcement of a wage increase during the election period which it had already made prior to any union activity at the plant was sufficient to overturn the election. (Union Objection No. 7).
4. Judge Green erred in dismissing the Union's claim that Vertis' counsel admitted interrogating employees regarding their union sympathies during the election even though the Union did not produce any evidence of that conduct at the hearing. (Union Objection No. 10).
5. Judge Green erred in refusing to consider the Union's claims that Vertis interrogated two employees about their support for the Union during the period and that it improved working conditions during that time even though those issues were neither raised in an objection nor mentioned in the Regional Director's report on Challenges and Objections.

Even a cursory review of the record establishes that the Union did not introduce evidence to support its position on the Challenged Ballots and Objections, and that Judge Green's conclusions have substantial support in the facts and law. The Union's contentions in support of its Exceptions are not supported by the record, and the cases on which it relies either support the

[2] The Union has abandoned the following Objections: 1, 2, 4, 5, 6, 8, 9, 11, 12 and 13. In addition, the Union does not challenge Judge Green's decision that a ballot marked with an "x" in the "No" box which also contained the written statement "Hell No" was valid. See ALJD at 9.

ALJ's Decision or are readily distinguishable from the facts in this matter. Accordingly, the Board should dismiss the Union's Exceptions and adopt the ALJ Decision.

II. FACTS

Much of the Union's recitation of facts is devoted to describing alleged actions which are the basis for objections dismissed by the ALJ which are not the subject of the Union's Exceptions. These include unsubstantiated allegations that Vertis threatened eligible employees, electioneered on the eve of the election, allowed eligible employees to threaten other employees, posted anti-Union and materially misleading literature in the plant, promised management positions to eligible employees, prevented employees from voting. A review of the record establishes that there is no evidence to support these allegations. The Union failed to produce any witness to testify as to them.

The Union also devotes a substantial portion of its recitation of facts on new allegations concerning one purported instance of alleged interrogation of two eligible employees and Vertis's actions in making plant improvements during the pre-election period which were discussed with employees and set in motion BEFORE Vertis had any knowledge of union activity at the Monroe plant. Even though the Union has filed exceptions to the ALJ's decision dismissing Objection No.'s 7 and 10, it has not addressed the specific allegations of those Objections. For reasons discussed infra at 30-39, these issues should not be the subject of this proceeding since they were not raised in any objection or investigated or mentioned in the Regional Director's Report on Challenges and Objections. In fact, they were not litigated and Judge Green properly refused to consider them.

Vertis adopts its statement of facts and citations to the Exhibits and transcript of testimony set forth on pages 5-20; 29-31; 32-35 and 39 of the Employer's Brief in Opposition to

the Union's Challenges and Objections. ("Employer's Brief"). In addition to the facts recited in the Employer's brief and in this Brief, Vertis states the following:

1. The Union incorrectly states that employees Frank Swercheck and Luisa Diaz assumed supervisory positions on the day Vertis learned of the filing of the petition. (Union's Brief at 3). The Union does not cite any record testimony that supports that statement. In fact the record is replete with testimony that these two employees remained in the lead position and were eligible to vote. See infra 10-22.
2. The Union's characterization of Jovana Chachua's testimony of Paul Sansouci's statements to employees is incorrect. Chachua, an eligible employee called by the Union admitted that on cross examination that Sansouci said only that Swercheck would represent the Finishing Department until they could find a supervisor. (Tr. 340).
3. Frank Swercheck did not have any conversation with employees Slemmer or Pinaha that he was an interim or acting supervisor or that he received a raise. (Tr. 498-499). Judge Green credited Swercheck's testimony. (ALJD at 2).
4. There is no evidence in the record that Swercheck made any independent judgments as to information he received from employees who notified him that they were not coming in. Both before and after the filing of the petition, his only responsibility was to relay that information to his supervisor. (Tr. 472).
5. The Union devotes 7 pages in its facts section to describing exhibits and testimony on alleged improper inducements and the purported interrogations of two employees which were not part of its Objections or mentioned in any way in the Regional Director's report. For the reasons stated at 30-39 herein, the consideration of those allegations is not appropriate because the Union did not timely object to them.

6. Contrary to the Union's assertion, none of the campaign materials, Union Ex. 3-16 contain improper promises of benefits or coercive statements. The Union has abandoned its objection that Vertis improperly promised a raise in 2012. The uncontradicted facts in the record are that prior to its knowledge of any union activity, Vertis' CEO announced a wage increase for all Vertis employees including those in Monroe, and that CEO repeated that promise in a statement to employees during the election period. (See Union Ex.'s 1 (pre-petition) and 2 (post-petition)). The record reflects that one shift of employees were not present to hear the pre-petition statement and that was replayed for them during the election period. (Tr. 403).
7. The Union failed to introduce any evidence that any of the initiatives identified in the Company's pre-election communications were decided after the Union filed its petition. In fact, most if not all of the initiatives documented by the Company in its communications were determined just prior to the filing of the petition, and before Vertis had any knowledge of the presence of the Union. (Tr. 388-389. See Union Ex.'s 14 and 16, Co. Ex. 4).
8. The Union introduced Ex. 2 which is the statement made by Vertis CEO Sokol on August 29, 2011. That document confirms that Sokol met with employees in July prior to any knowledge about the Union, and he received and acted upon complaints from employees about the Monroe facility and working conditions. (See Ex. 2 pages 3-6). The Union's contention that there is no evidence of the July meeting (Union's Brief at 11) is patently incorrect.

9. The Union's claim that Gilman made the first and only physical contact with Peretti is not supported by the record. The record contains the following evidence as to this issue: (Union Objection 3).

Alyce Wilburn, a receptionist for Vertis who served as the employer's observer for the election, testified that Paretti yelled and cursed at Gilman in the employee break room following the first session of the election, and jabbed his finger back and forth closely in front of Gilman's face in a threatening manner. (Tr. 13, 19, 21, 22, 24). Gilman asked Paretti to move his finger out of Gilman's face, but Paretti refused. (Tr. 20, 22). According to Wilburn, in self-defense, Gilman used his hand to move Paretti's hand out of the way. (Tr. 34).

The incident occurred in Wilburn's clear view in the presence of Vertis' management representatives and lawyers, the Union's representatives and lawyer, two Board agents, and John Visconte – the only eligible voter in the room. (Tr. 20-21, 23,-24, 17-19). At the time of the incident, the doors to the room were closed, the windows were blacked out with paper, the surveillance cameras were covered, and the polling did not open right away after the incident. (Tr. 24-25, 69, 98-99).

Notably, the two Board agents who were present, did not comment or intervene. (Tr. 25).

The Union called five witnesses as to this incident, including David Cann, Paretti, Doklia, Putman, and Visconte. Not surprisingly, the testimony of all five of the witnesses significantly varies:

- Paretti testified that he did not point his finger at Gilman, but Gilman pointed his finger at him, and that Gilman grabbed Paretti and pushed his arm down. (Tr. 86-88).

- Rickey Putman testified that Gilman put his finger in Paretti's face and grabbed Paretti's arm, and that Paretti did not grab Gilman's finger. (Tr. 113).
- Doklia testified that he "saw [Gilman] poke Mr. Paretti and put a hand on his chest." (Tr. 120).
- Cann never mentioned pointing or poking. The only physical movement he testified to was that Paretti put up his hand and said "Get out of my face." (Tr. 60).
- Visconte testified that Gilman pushed Paretti. (Tr. 281).

The resolution of this conflicting testimony is not material because there is no evidence that the incident interfered with the employees' exercise of free choice in the election.

The common facts as to this incident are that:

- It took place in the break room where the election was scheduled to be held.
- The incident occurred during a pre-election period before any eligible voter other than the Union's observer was in the room.
- The doors and windows to the room were closed and blacked out. No one outside the room heard or saw the incident. No eligible voter other then the Union's observer heard or saw the incident.
- There were raised voices by both Paretti and Gilman, and the incident was over in less than one minute.

- There is no evidence in the record that this incident affected the voting conduct of any employee. (Tr. 17, 66, 68- 69; 97-98; 111, 123, 282).

Visconti, the Union's observer and a member of the proposed bargaining unit testified that the incident did not cause him to change his vote:

Q: Okay. And you were a supporter of the Union, correct?

A: Yes.

Q: And did you see anything there that happened that day to change your vote?

A: No. (Tr. 283).

III. ARGUMENT

A. THE UNION'S EXCEPTIONS TO THE ALJ'S DECISION ON CHALLENGES TO THE BALLOTS OF SWERCHECK AND DIAZ MUST BE DISMISSED BECAUSE THE UNION HAS FAILED TO INTRODUCE ANY EVIDENCE TO SUPPORT ITS CLAIM THAT THESE EMPLOYEES WERE SUPERVISORS

The Union filed 7 Exceptions to Judge Green's findings that the ballots of employees Swercheck and Diaz should be opened and counted. The Exceptions make the following contentions:

- The ALJ erred in finding that Swercheck and Diaz did not exercise or were authorized to exercise supervisory authority. (ALJD at 2, Exception 2).
- The ALJ erred in his credibility determination that Swercheck did not exercise supervisory functions and that he was not assigned to be an interim or temporary supervisor. (ALJD at 2, Exception 3).
- The factual finding that Diana Ryder performed the jobs of Manual Insertion and Scheduler was incorrect. (ALJD at 3, Exception 4).

- The ALJ erred in finding that Diaz needed to obtain Ryder's approval to deal with employee problems or work issues. (ALJD at 2, Exception 5).
- The factual finding that Diaz was not promoted to supervisor until after the election was an error. (ALJD at 2, Exception 6).
- Judge Green's conclusion that assuming that employees were informed that Swercheck and Diaz were temporarily assuming supervisory positions should vest them with Section 2(11) status.

Each of these exceptions is incorrect as a matter of fact and law.

Judge Green concluded that both Swercheck and Diaz were not supervisors because:

1. Neither of them ever exercised or were authorized to exercise Section 2(11) responsibilities. (ALJD at 2; Tr. 469-475, 400-402, 485, 498).
2. There was no evidence that the job status or pay of Swercheck or Diaz changed at any time prior to the election. Neither of them received any pay increase for exercising alleged additional responsibilities. (ALJD at 2; Tr. 485; Co. Ex. 5).
3. There was no evidence that Swercheck or Diaz actually performed supervisory functions in any "temporary assignment". (ALJD at 3 n. 2; Tr. 469-475, 451-461).
4. Even if they were assigned supervisory positions "temporarily", such assignment was of limited duration. Id.
5. The parties stipulated that the lead position in which Swercheck and Diaz were employed was included in the bargaining unit. (ALJD at 3; see also Board Exhibits 1 & 2).

The burden of proving supervisory status is on the party alleging it exists, and "that burden does not shift." Chemical Solvents, Inc., 331 NLRB 706 fn. 3 (2000). The evidentiary

burden of proving supervisory status is "significant and substantial." NLRB General Counsel Guideline Memorandum Concerning Oakwood Healthcare at 2 (April 10, 2007). "Purely conclusory" evidence is insufficient to establish supervisory status; a party must present evidence that the employee "actually possesses" the Section 2(11) authority at issue. Id. In addition, Judge Green's findings as to credibility should not be overruled except where the clear preponderance of relevant evidence establishes that he was incorrect. Standard Drywall Products, Inc., 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3rd Cir. 1951).

1. The Record Overwhelmingly Establishes That Swercheck and Diaz Never Performed Supervisory Duties.

There is ample evidence in the record supporting Judge Green's decision to overrule the Union's challenges to the ballots of Swercheck and Diaz.

Prior to and during the entirety of the critical period, Swercheck and Diaz worked as Leads in the Finishing and Manual Insertion Departments, respectively. (Tr. 468; 442). The Union incorrectly assumes that Swercheck and Diaz took over vacant supervisory positions. Union's Brief in Support of Exceptions ("Union's Brief" at 25). There is no support for that assumption in the record. In fact, the record establishes that Paul Sansouci, Vice President of Operations took over the duties of Swercheck's former supervisor Bill McGuigan, and that Diana Ryder remained in the position of Manual Insertion Supervisor and simultaneously held the Scheduling supervisor position. (Tr. 394, 409, 439; 442-443, 445).

Judge Green concluded that the testimony of Swercheck and Ryder on these points was credible. (ALJD at 2). There is no evidence in the record, much less a preponderance of evidence supporting the Union's assertion that the testimony of Swercheck and Ryder should be discounted as self serving. (Union's Brief at 24). This testimony is detailed about the duties

and authorities of Swercheck and Ryder and both witnesses were consistent in describing the facts from direct through cross examination.

Swercheck testified about his job duties:

- "I come in every morning, check the reports to see where we stand for the work that's due both that day and the immediate future. And then Paul Sansouci comes in and gets together with me, and he goes over the reports and tells me where he wants everybody to work. Then I go out on the floor and make sure that each Kern operator is running the product that Paul assigned to those Kerns. I just verify with the operators what they are running. And I'll look at what they have there and make sure that that's what they're running."
- Swercheck and the employees working in his department consult various reports, such as "job bags," which contain detailed instructions regarding everything an employee needs to know to process each job:"I look at the jobs, themselves, the black and whites, the job bags will describe what jobs they are running so that way I know what they are doing at their current machine."
- I do a lot of troubleshooting if they have problems with materials or problems with how the job is running."
- If issues come up, I'll try to resolve those issues. We could have an envelope that seems to be the wrong size or the flaps aren't the right measurements. I'll have to research that and see if it, indeed, is the right envelope. I'll go to the person who ordered them and ask them if it's correct. If a decision has to be made on something like that, I'll go to Paul Sansouci and show him what's going on and let him decide."
- "If we are low on something, if somebody needs something, they'll present the sheet to me, I'll fill it out, and I'll give it to Paul Sansouci for his approval."
- "We have a stager whose job it is to have that product staged with the job so that the operators don't have to go forward and get it. If there is an issue where something is not ready, then I'll get with the stager. Or if I can't find him, I'll get with the warehouse department and have them bring the product so that we can get it out to them."
- Swercheck works with the scheduler in preparing the schedules only if "they have an issue that they want to know if somebody is going to be out or if there is a piece of equipment that's down. Otherwise, how it's scheduled between Diana Ryder and Paul Sansouci is the course that I follow."
- "I'm not developing the staff's skills."
- "And I'm not assisting in any evaluation of [the staff's] volume."

- "I'm just carrying out what I'm told."
- "I don't train the employees."
- "I don't make adjustments or assign resources or make recommendations to change things."
- "I don't assist with the work assignments. I hand out the work assignments as they are given to me."
- "[W]hen I'm told to move somebody, that's when I move them."
- Swercheck attends production meetings with supervisors and other leads who are in the bargaining unit only to provide and receive information on the status of jobs. (Tr. 469-475, 477-478; Chahua 25; 493-495; see Company Ex. 8).

Swercheck has never hired, fired or disciplined employees or performed any other supervisory functions. (Tr. 471, 475-476; 492). Swercheck testified that his duties have not changed at any time. (Tr. 471).

The Union has conceded that Swercheck and Diaz did not have supervisory status prior to the filing of the petition. The Union has not made any contention in its brief and it did not introduce any evidence that Swercheck and Diaz had 2(11) status prior to the filing of the petition.

Harper testified that Swercheck did not work for Vertis as a supervisor in an acting, interim or permanent capacity at any time during the critical period of July 28, 2011 through August 31, 2011. (Tr. 400-401). Harper further testified that Swercheck did not receive a pay increase during the critical period. (Tr. 402, 485, 498). Swercheck and his pay records confirm this fact. (485; See Co. Ex. 5).

There is no evidence in the record that proposed bargaining unit employees regarded Swercheck as a supervisor.

Ryder testified as to Diaz's job duties as a Lead:

- Job tickets used in the Manual Insertion Department describe exactly what work needs to be done.
- Ryder gave Diaz "her directions of all the priorities that we have on the area and what we needed to get done, and

actually tell her which person she'll be working on which project, because we have different projects going through the area."

- Diaz spent "probably 90 percent" of her time performing the production work of manual inserting alongside other stipulated bargaining unit employees in the department.
- Diaz did not have any responsibilities with respect to hiring, firing, and evaluating employees, resolving employee issues, determining when and which employees should work overtime, or determining when to order temporary employees. (Tr. 414-16, 442-445, 465-466).

Ryder further testified that while she was holding both the Scheduling job and the Manual Insertion Supervisor job, Diaz was a Lead:

- Diaz would help Ryder "to make sure that all the workflow was moving around."
- Ryder asked Diaz to "keep an eye on the girls or on the crew" because Ryder had to go in and out of the Manual Insertion area.
- If Ryder was not around and the department had "any issue, if [Diaz] is able to actually solve it, solve it. If not, she will get in contact with me. Either she will call me or she will page me. Or if she wasn't able to reach me, she'll just wait for me and just move on with something else.
- Diaz contacted Ryder "a lot, because she didn't take any decision without my blessing." (Tr. 444-445).

Chahua, who does not work in Diaz's department (Manual Insertion), testified that she sends work to Diaz and

- Diaz "is the one that organize [sic] the jobs."
- Diaz "is the one that tell [sic] the other girls what they have to do."
- Sometimes Diaz sends "someone from her department to come" and pick up work. (Tr. 339-340).

Diaz did not work for Vertis as a supervisor in an acting, interim or permanent capacity, and did not receive a pay increase, during the critical period of July 28, 2011 through August 31, 2011. (Tr. 400-402; 485, 498; See Co. Ex. 6).

Prior to being the supervisor in the Manual Insertion Department, Ryder was a Manual Lead. (Tr. 440). Because the Union did not call any witnesses with first-hand knowledge of Diaz's duties and Ryder held the Manual Lead position in the past, testimony by Diaz would have been unnecessary and duplicative. The Union criticizes Judge Green's decision because it failed to account for the fact that Diaz did not testify. (Union's Brief at___). However, the Union could have subpoenaed Diaz, but chose not to call her. In fact, the Union did not call any eligible employee working the Manual Insertion Department to testify in support of its baseless allegations that Diaz was a supervisor.

2. The Union Has Failed To Establish That Eligible Employees Regarded Swercheck and Diaz As Supervisors.

There is no evidence in the record that the proposed bargaining unit employees regarded Diaz or Swercheck as a supervisor. The testimony of employees called by the Union to testify is confirms this fact. For example, Chachua testified:

> A: He advise [sic] me and the rest of the worker which is the job that we have to do first.
> Q: Okay. And did he do anything else besides that?
> A: He is always on that floor. He walks around, looking.
> Q: Good. And now has that changed in any way?
> A: No, continue [sic] the same.
> . . . .
> Q: . . . . Isn't it true that Mr. Swercheck did the same things as a lead that he did as a [purported] supervisor?
> A: Yes. (Tr. 338; 342).

Two Union witnesses testified that they contacted Swercheck to call out from work during the critical period. (Tr. 336, 346-347). However, one of these witnesses also testified that she contacted Swercheck to call out before the critical period as well. (Tr. 342). Swercheck testified:

> [o]nce somebody reports out, I'll just report to that department, John Geiger for the bindery. Or if it's for our department, I'll let Paul Sansouci know how many people are out, who is out. He knows what machines

they run, so I just let him know who they are. (Tr. 472).

The Union attempts to concoct a "missing" supervisor theory in its argument that there were no supervisors on the shifts in the departments in which Swercheck and Diaz were working as leads; therefore, claims the Union, they must be supervisors. (See Union's Brief at 25). The testimony in the record, however, completely undermines this contention. Swercheck stated without contradiction that Sansouci exercised all of the supervisory functions on that shift in his department. (Tr: 469-475, 477-478, 493-495). Similarly, Ryder testified that she didn't allow Diaz to make any independent decisions on work, and no decisions on employees. (Tr. 451). The Union failed to call a single witness to testify to any fact demonstrating or implying that Swercheck or Diaz actually assumed any supervisory functions at any time prior to the election in any permanent, acting or interim capacity.

Accordingly, the record contains uncontradicted evidence that Swercheck and Diaz did not perform supervisory job duties at any relevant time.

3. The Union's Contention That The Judge Correctly Determined That Sansouci's Alleged Announcement of Swercheck And Diaz As Acting/Interim Supervisors Bestowed Section 2(11) Status Is Incorrect As A Matter Of Fact And Law.

The Union's principal contention in support of its Challenges is that Vertis allegedly identified Swercheck and Diaz as acting or interim supervisors and on that basis alone, Union claims that its Challenges to their ballots should be upheld. The Union's witnesses testified inconsistently as to what was said at the August Finishing Department meeting. The testimony on this issue is as follows:

- Swercheck testified that Sansouci mentioned that he would take over the duties of the Manufacturing Manager position and that Swercheck would "step up" to assist him during the transition period to a new manager. (Tr. 446-447, 459, 483-484).

- Union witness Chahua testified that the department was going to be "represented" by Swercheck, Ryder would do the schedule and that Diaz "was going to take Diana's job".
- Union witness Pineda, who does not work in either the Finishing or the Manual Insertion Department testified that Sansouci said that Swercheck was going to be the supervisor in the meantime until they found a replacement for McGuigan. (Tr. 346-348).
- Union witness Slemmer testified that Sansouci said that:

  "in the interim or temporarily Frank Swercheck will be filling in for Bill McGuigan. And Luisa Diaz would be filling in Diana Ryder's position as supervisor of the manual area. (Tr. 219).

Slemmer's testimony varied from direct to cross-examination. Judge Green found it unnecessary to resolve any conflict in the testimony as the resolution is not material to determining the legal merits of the Challenges. (ALJD at 3.) Instead, he assumed that Sansouci told employees that Swercheck and Diaz would be temporarily assuming supervisory positions Id. There is no evidence that Vertis ever made any announcement that either Swercheck or Diaz would assume a permanent supervisory position before the election. In fact, Swercheck testified that he did not apply for McGuigan's job and Ryder testified that Diaz applied for but did not get her supervisor position until months after the election. (Tr. 401, 402).

Even if the assumption that these employees held acting or interim supervisory role is fact, that does not, by itself, bestow supervisory status. The Union still must introduce particularized proof that Swercheck and Diaz actually performed job responsibilities that are encompassed in the Board's definition of supervisor in Section 2(11) of the Act. See Guideline Memorandum Concerning Oakwood Healthcare, Inc. (April 10, 2007) at 2 ("[T]o meet the burden of proof, testimony must include specific details or circumstances making it clear that the claimed supervisory authority exists." ADB Utility Contractors Inc., 2007 WL 2430006

(N.L.R.B. Div. of Judges August 23, 2007) slip op. at 15 (noting that "day-to-day" reality is controlling). General descriptions or characterizations of either a current or future position as "supervisory" is inconclusive and unsatisfactory proof of supervisory status. Guideline Memo at 2 ("Conclusory evidence . . . [or] job titles [or] descriptions, [or] . . . merely asserting as a general matter that individuals exercised particular supervisory duties is insufficient."). In this case, the record does not contain any indication that Sansouci provided any details of what Swercheck or Diaz were to do or what their authorities were at the meeting.

The same principles apply to the alleged announcements of, or references to, acting or interim supervisory status. A simple announcement from even a high ranking official that an employee is a supervisor is not sufficient. In Diversified Enterprises, Inc., 353 NLRB 1174, 1182 (2009) the Board held that CEO's statement to employee that he was a supervisor did not mean that he was a "statutory supervisor" as defined by Section 2(11) of the Act, and the Board held that regardless of the CEO's statements, the employee "level of judgment...used in assigning tasks did not give rise above the level of routine" and therefore, the employee was not a supervisor.) The Board also has held that even if other employees refer to a specific position as a supervisory position does not result in that employee being held out as a "statutory supervisor" as defined under Section 2(11) of the Act. In Croft Metals, Inc., 348 NLRB 717 (2006) the Board held that those employees who were referred to as were not "supervisors" as defined under the Act because they did not have any supervisory authority being the responsibility to direct which was seen as "merely routine or clerical.")

The Union did not even attempt to distinguish these cases. Thus, the Union must still provide particularized proof that Swercheck and Diaz actually performed job responsibilities that are encompassed in the Board's definition of supervisor in Section 2(11) of the Act.

See Also Croft Metals, Inc., 348 NLRB 717 (2006) (employee was not a supervisor, even though he was sometimes referred to as a supervisor); Sam's Club, 349 NLRB 1007 (2007) (employee was not a supervisor, even though she told co-workers she was a supervisor); Talmadge Park, Inc., 351 NLRB 1241 (2007) (employee was not a supervisor, even though she referred to herself as a supervisor); In re Fraternal Order of Eagles, 115 LA BNA 1636 (2001) (same). There still must be proof that the individuals actually exercised supervisory responsibilities, and there is no evidence that Swercheck or Diaz's responsibilities changed before or during the critical period. The Union contends:

> Certainly that the employees in the Finishing Department understood Diaz and Swercheck to be their supervisors after the meeting, referring to and treating them as such thereafter...

See Union's Brief at 25. The Union does not cite any record evidence to support this contention.

The reality reflected in the record is that regardless of Sansouci's remarks, he assumed the supervising duties in the Finishing Department after McGuigan and before Geiger was hired and Rider maintained the supervisor duties in the Manual Insertion Department until Diaz was promoted over two months after the petition was filed.

Moreover, even if Swercheck and Diaz were *actually* performing the roles of acting or interim supervisors temporarily during the critical period, such actions do not bestow 2(11) status. While the record is devoid of evidence that they did perform as acting or interim supervisors, an interim or temporary assignment to a supervisory position or supervisory duties does not make one a statutory supervisor. The Board has ruled that an employee who substitutes for a supervisor needs to spend a "regular and substantial portion of [the employee's] working time performing supervisory tasks" in order to be considered a supervisor. Carlisle, 330 NLRB 1359, 1361 (2000).

> "Individuals holding temporary supervisory positions are normally found eligible to vote in Board elections because, in most situations, temporary supervisor assignments may properly be viewed as relatively insignificant interludes in regular employee assignments."

United Exposition Service Co., 300 NLRB 211 (1990).; see also E.I. Dupont, 210 NLRB 395 (1974); Bard Manufacturing Co., 1994 WL 1865798 (Div. of Judges 1994) ("The jurisprudence suggest that when someone is acting in a temporary position even when that position is a supervisory one, that will not render the voter ineligible").

The cases cited by the Union do not support its contentions. In Fred Meyer Alaska, Inc., 334 NLRB 646 (2001), the Board held meat and seafood managers to be "statutory supervisors" because there was undisputed evidence that these managers had "made recommendations regarding hiring process that were followed by other employees" and that they were in charge of their departments (*i.e.*, "everything that is done in the [North Fairbanks seafood] department comes down to [the manager].)" Id. at 649. In fact, there was no contention in that case that supervisory status was bestowed by the mere announcement of the employee as an acting interim supervisor.

In U.S. Gypsum Co., 93 NLRB 91, 92 (1951), the Board concluded that the employees in question were supervisors where each had been told by the employer that they had supervisory authority; each had exercised that authority, and the employer paid them substantially higher wages then their subordinates and accorded the same privileges as those who were salaried supervisors. The facts of the instant case are not comparable. In the case at hand, the employees in question were not told that they had supervisory authority, and they did not exercise any such authority. Moreover, Swercheck and Diaz had no change in pay from the lead rates they had been receiving.

Wasatch Oil Refining Co., 76 NLRB 417, 423-424 (1948) is another case which the Union incorrectly characterizes as supporting its contentions. In that decision, the Board cited the fact the employees specifically maintained the right to effectively recommend changes in status of employees in their group, even though they never exercised that authority. Id at 423. There is no evidence that Swercheck and Diaz ever had such rights. Additionally, there is no evidence that there was any discussion between anyone in Vertis management and Swercheck and Diaz as to what, if any additional duties they had after the terminations of August 1. There was simply no specific notice to either Swercheck or Diaz of supervisory authority.

The remaining cases relied upon by the Union also support and are consistent with the ALJ's decision that Swercheck and Diaz are not supervisors. In Volair Contractors, Inc., 341 NLRB 673 (2004), the Employer never told the employee that he had any supervisory authority on a project and thus, without supporting evidence that the employee demonstrated such authority, the Board held that the employee was not a supervisor within the statute. Id. at 674-75. In the case at hand, there is no testimony that Swercheck or Diaz were told that they had supervisory authority and there is no evidence in the record that either of those employees actually exercised that authority. In Birmingham Fabricating Co., 140 NLRB 640, 644 (1963) the Board found supervisory status to be present where employee was titled as "leaderman" but in fact received requests for raises and made recommendations on them; kept discipline; granted time off; took up employee complaints and where there was testimony by employees that they regarded the employee in question as the boss. None of those facts are present in the instant matter.

The Union also contends that Swercheck and Diaz are supervisors because Vertis designated them as interim supervisors for an indefinite period of time. Union's Brief at 23-24.

The facts in the record do not support this contention. It is uncontradicted that the position that the Union claims Swercheck occupied was filled by another employee prior to the election. (See Tr. 409, 469). In addition, Diaz applied for the supervisor position that the Union claims she occupied but was not promoted until months after the election. (Tr. 401, 445, 448).

The Union's reliance on the Board's ruling in E.I. Dupont de Nemours & Co., Inc., 210 NLRB 395, 397 (1974) is misplaced because the facts in Dupont are very different than the present matter. In Dupont, employees were selectively promoted to relief foreman positions and remained in those positions varying from several months to two years. In addition, there was evidence that in the past many of the relief foremen become permanent foremen and/or remained in some supervisory capacity to relieve the actual permanent foremen as necessary. Id. at 396. The Board concluded that the relief foremen were supervisors:

> All 11 relief foremen were advised when promoted that their tenure would be temporary, but there is no evidence that any of these relief foremen or any of the unit rank-and-file employees had been advised by the Employer of a specific time when the relief foremen would cease to exercise supervisory authority and would return to their unit jobs.

This is not true in the present matter. Vertis was accepting applications for both supervisor positions, evidenced by the eventual appointment of a new supervisor, not Swercheck, to replace McGuigan prior to the election. That was a period of less than one month. The same is true for Ryder's position. Diaz had to apply for the position as others did. Just over two months later, Vertis promoted Diaz to the position. Another critical difference between the facts in Dupont and the instant matter is that the supervisors in Dupont actually "supervised" the very employees in the unit, for the entire period of the organizational campaign up to and including the election." Id. In this matter, there is no evidence that Swercheck or Diaz actually supervised the employees within their Department. Even if Swercheck or Diaz assumed the temporary or

interim supervisory role, these were "reasonably insignificant interludes" in their regular lead assignments.

Therefore, the Union's challenges to the ballots of Swercheck and Diaz must be overruled, and the Board should order that their ballots be opened and counted.

B. THE UNION'S EXCEPTION TO THE ALJ'S DECISION DISMISSING ITS OBJECTION TO THE ALLEGED PHYSICAL ASSAULT MUST BE DISMISSED BECAUSE THERE IS NO EVIDENCE THAT THE ALLEGED CONDUCT HAD ANY EFFECT ON THE EMPLOYEES' FREE CHOICE IN THE ELECTION.

The Union filed three Exceptions to Judge Green's decision that the incident involving a Vertis Attorney and a Union Vice President was not sufficient to set aside the election. In its brief, the Union alleges that Judge Green erred in dismissing its Objection No. 3 by claiming that: (1) Judge Green failed to consider significant facts relating to Vertis' conduct; (2) that Vertis' intent in engaging in a physical altercation with the Union was to prevent Visconti from participating in the election; (3) that Judge Green should not have considered that the only voting employee, Visconti, who witnessed the incident testified that it had no effect on him; and (4) that the closeness of the election results weighs in favor of setting aside the election. (Union's Brief at 28-30). Each of the Union's claims referenced in its exceptions is incorrect as a matter of fact and law.

1. The Union's Allegations Of Fact As to Vertis' Alleged Physical Assault Are Not Sufficient To Set Aside The Election.

The Union's claim that Judge Green failed to consider important facts regarding the dispute between Vertis' attorney ("Gilman") and the Union's Vice President ("Paretti") is not supported by the record. A closer look at the Union's allegations establishes that the alleged incident had no consequence on the election and that the Union's "significant" facts simply are insufficient to establish a viable objection that would set aside the election.

The objecting party has the burden of proof to demonstrate that a party's improper conduct created a general atmosphere of fear and reprisal rendering a fair election impossible. Accubuilt, Inc., 340 NLRB 1337 (2003); Mediplex of Connecticut, Inc., 319 NLRB 281, 295-297 (1995). The burden of proof is a "heavy one." Dish Network Corp., 2011 NLRB LEXIS 425, *33 (August 11, 2011). In the instant matter, there is no evidence that any conduct by Paretti or Gilman "created a general atmosphere of fear and reprisal." There is no evidence that any employee outside of the room even knew about the interaction. The Union cannot prove that news of it spread among company employees who had not yet voted and that it impacted or probably impacted their votes.

The Union spends substantial time in its brief describing alleged actions of Gilman prior to the purported incident and at the vote count. It accuses Gilman of hostility to Peretti "earlier in the day" and at the post election vote count. (Union's Brief at 17, 19). There is no evidence in the record that any eligible voter observed any conduct of Gilman or Peretti other than in Visconti's presence during the than the incident described in the pre- election conference. Accordingly none of that alleged activity can be the basis of a valid objection because it could not have interfered with the free choice of employees. Also, there is no evidence that any action by Gilman or Peretti interfered with the conduct of the election.

The Union ignores the testimony of Alyce Wilburn, a receptionist for Vertis who served as the employer's observer. Wilburn was not an eligible voter, is not a member of management, and is the only witness with no stake in the outcome of the election. She credibly testified that: the interaction was instigated by Paretti's abusive conduct (using loud profanity and jabbing his finger at Gilman's eyes); Gilman repeatedly asked Paretti to get his finger out of Gilman's face, and Paretti refused; and Gilman acted in self-defense when he moved Paretti's hand away; and

no eligible voters witnessed the incident other than John Visconti. (Tr. 19-26). As Judge Green noted, "[t]his is not going to make it to Law & Order." (Tr. 34).

Of course the Union claims that Gilman started the incident by shouting and using profanity. (Union's Brief at 29). The Union alleges in its Brief that "no witness that testified claimed that Paretti started the argument." (Union's Brief at p. 17). This is not true. Wilburn testified that Paretti started the dispute. (Tr. 19-26). The Union also alleges that Gilman committed a physical act by shoving Paretti; however, this is not what most Union witnesses observed. Id. In fact, none of the witnesses could agree as to the physical interactions between the Paretti and Gilman. For example, Paretti claims his arm was pushed down. (Tr. 86-88). Ricky Putnam claims Gilman put his finger in Paretti's face and grabbed Paretti's arm. (Tr. 113). Michael Doklia claims Gilman poked Paretti and put a hand on his chest. (Tr. 120). David Cann never mentioned pointing or poking. (Tr. 60). Visconti claims that Gilman pushed Paretti. (Tr. 281). Regardless of whether the Union could harmonize all of this inconsistent testimony, it still has no viable claim to set aside the election.

Under well settled Board law, the Union's allegations of misconduct (i.e., shouting at and shoving another individual) are not sufficient to set aside an election. Mediplex,319 NLRB 295-297; Accubuilt, Inc., 340 NLRB 1337. In Mediplex, the union's vice president physically assaulted the employer's counsel on the day of the election in the plant in front of eligible voters. The assault was in response to the employer's counsel placing a finger in the face of the Union vice president. There was yelling and cursing shouted (i.e., "[g]et your f-----g finger out of my face") and the altercation ended with a "push and shove incident." Id. at 296-297. The incident was observed by some employees and described by the employee observers to other employees. Id. at 297. Moreover, there was also evidence that prior to the incident, there was

goading and other aggravating conduct by the participants in the incident toward each other. Id. Employee election observers were also present. Id at 295. The Board held that this "conduct falls far short of that evaluated by the Board in cases involving direct threats to employees of physical assault and even death." Id. at 297 (citations omitted). Similarly, in Dish Network Corp., supra, the Board held that a pro-Union employee slapping a Company observer after the pro-Union employee had finished voting was not sufficient evidence to set aside an election. The legal analysis and conclusions in Mediplex are exactly on point with the instant matter.

The Union fails to address Judge Green's reliance on Mediplex in its Brief, even though the conduct in that is case is similar, if not more egregious, than the alleged physical dispute between Vertis and the Union. (ALJD at 5). Instead, the Union cites a case that has no factual similarities to the present matter, involving a union agent verbally threatening an employee with his job and a "physical threat." Baja's Place, 268 NLRB 868 (1984). In that case, the Board sustained an objection to the election wherein a union agent, 3 days before the election, sent an obscene letter **to an employee** then later threatened to "get" that employee and to "get" his job. Id. The Board reasoned that the employee was a professional bartender and the union agent had influence with respect to a significant number of employees in the industry. Id. The Board also found that the victim reported the matter to his employer as well as disseminating the information to several other employees before the election occurred. Id. In this matter, it is undisputed that there was no threat for Visconti to lose his job from anyone, nor were there any employees aware of the alleged conduct between Paretti and Gilman.

The Union's reliance on Batavia Nursing and Convalescent Inn, 275 NLRB 886 (1985) is also misplaced. In that case, the physical assault came right after and was closely linked to employer condoned celebrations that the union lost the election. Id. at 891. The Board adopted

the ALJ's conclusion that: " In the activities room, just before the assault, administrator Hodges and facility coordinator Lehman together with Steiner, had displayed to the employees present Respondent's open satisfaction at the Union's defeat." Id. In the instant matter, there are no statements linking the alleged assault with any eligible employee or the union in particular. In fact, the only testimony on the source of the incident was that it began after Paretti questioned Vertis Vice President Harper as to whether the employer was paying its observer to be present during the election. (Tr. 60).

There is no evidence that Gilman's alleged physical actions or verbal conduct were with or toward employee Visconti or any other Vertis employee. Additionally, there is no evidence that Visconti participated in the incident. In fact, there is no evidence that any of the alleged ethic statements were heard by any employee. The Union also makes other unsupported claims, including the fact that Gilman allegedly insulted Paretti's Italian Heritage, by stating "Oh yeah, go have your meatballs." (Tr. 84, 95). Even if this statement were true, it is irrelevant because the Union conceded that the statement was not made in front of any eligible voters and no employees were aware of the comments. Id. Any act which is not known to eligible voters and not witnessed by them cannot be the factual predicate for a finding that objectionable conduct has occurred.

The conduct alleged to have been committed by Paretti and/or Gilman is not as egregious as the parties in Mediplex, and furthermore, the actions occurred in front of only one eligible employee, who conceded that the incident had no effect on his vote. Quite simply the Union has failed to meet its burden to provide any evidence that the alleged conduct by Paretti or Gilman created a general atmosphere of fear and reprisal. As Mediplex makes clear, a company attorney

shouting profanity and physically shoving a union representative is not sufficient evidence to set aside an election.

2. The Union's Claims That The Alleged Physical Assault Was Designed To Intimidate Employees From Participating In The Election Is Not Supported By The Record.

The Union's allegation that Gilman's alleged physical assault towards Paretti was an attempt to exclude Visconti from his position as Union observer is not even supported by the Union's statement of facts. (See Union's Brief at 17- 29). It is undisputed that Visconti's role as a Union observer was secure prior to any of the alleged physical conduct by either party. (Tr. 85-86). After a question arose regarding Visconti's participation, a Vertis' Human Resource Representative informed the Union that Visconti could remain in the election room provided he "clocked out." Id. The parties agreed that this was sufficient. (Tr. 86). The alleged physical assault occurred only after Paretti made a comment about whether the employer's representative had to clock out. Id. Thus, there is no evidence to suggest that Gilman's alleged physical conduct caused Visconti to lose his role as observer or was meant to intimidate him in participating in the election.

3. John Visconti's Testimony Regarding The Effect that the Alleged Physical Assault Had On His Vote Is Relevant.

The Union incorrectly argues that Judge Green should not have considered the fact that the only employee who witnessed or even knew of the alleged improper conduct, John Visconti, testified that the incident had no effect on his voting. The Union cites no case or support for such a claim, except to state that the question of whether the alleged incident made a free and fair election impossible is an objective test not a subjective test. While it is correct that the Board analyzes conduct through an objective standard, there is no support for the Union's claim that Visconti's testimony as to the lack of effect of the incident is irrelevant. In fact, Visconti's flat

denial that the incident changed his view of how to vote is compelling evidence of the trivial nature of the incident as it relates to the issue of free choice.

It is undisputed that Visconti was the only eligible voter who saw or overheard the exchange between Gilman and Paretti. There also is no evidence that the incident disturbed the laboratory conditions of the election. In fact, it is undisputed that at the time of the incident, the doors to the room were closed, the windows were blacked out with paper, and the surveillance cameras were covered. (Tr. 24-25, 69, 98-99). The Union has provided no evidence that any employee outside of the room knew about the incident or that that news of it spread among employees who had not yet voted and that it impacted or probably impacted their votes. Thus, regardless of whether the Judge considers Visconti's opinion or not, the Union has failed to demonstrate any evidence that the alleged conduct resulted in an interference with a free and fair election. Since the conduct was not directed at him, and was not linked to any other anti union conduct, it would not have reasonably tended to coerce Visconti into voting against the Union.

4. Multiple Factors Are Considered In Determining Whether A Physical Assault Rendered A Fair Election Impossible.

In determining whether a party's misconduct resulted in a making a fair election impossible, the Board considers a number of factors. The Board analyzes the severity of the alleged conduct, the number of employees subjected to the misconduct, the extent of dissemination of the conduct among the bargaining unit employees, among others. Accubuilt, Inc., 340 NLRB 1337.

The Union attempts to criticize Judge Green's decision because he considered the fact that Visconti was the only eligible employee who witnessed the alleged incident. The Union incorrectly claims that in a close election, one employee witness is sufficient to constitute objectionable conduct. (Union's Brief at 30). The Union constructs an incorrect argument that

because there only was one employee who witnessed the altercation, Visconti, and the election was tied among those against and for the Union, then Visconti's vote is outcome determinate. Actually the vote was 37 in favor of the Union and 35 against with 2 Challenged Ballots. This argument does not make any sense considering the law and the undisputed facts.

If only one eligible voter witnessed the incident, and that eligible voter testified that it had no effect on him, there should be no question that the occurrence did not have any effect on the employees' right to have a free and fair election. Visconti, the only person who saw or knew of the alleged improper conduct, was an active Union supporter and the Union's observer. As such, his vote would not have changed or have otherwise been influenced based on Paretti's attack. In fact, he testified that the incident did not affect his vote in any way. (Tr. 283). Accordingly, the incident was not "so related to the election" as to have a probable effect on the election. In view of this, the objection must be dismissed. See Super Thrift Markets, Inc., 233 NLRB No. 66 (1977) (holding that, when it is virtually impossible for alleged employer misconduct to affect the outcome of the election, the election should not be overturned).

In any event, the Board does not weigh one factor above all the others. Accubuilt, 340 NLRB 1337. (The Board, in accordance with precedent, assesses "whether a general atmosphere of fear and reprisal existed in the Employer's plant, rather than merely comparing the number of employees subject to any sort of threats against the vote margin."). In fact, in the Union's own brief, it recognizes that the Board considers voting margin to be one of several factors. Avis Rent-A-Car System, 280 NLRB 580, 581 (1986) (factors include: "(1) the number of the incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the

degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the union.") In considering these factors, as demonstrated above, there was only incident, that did not persist in the minds of any eligible voters, nor did the conduct disseminate to any other voters, and while the incident occurred just prior to the election, the only voter who saw or was aware of the incident said that it had no effect on him. As a result, the Union has no viable objection to setting aside the election.

C. THE UNION'S EXCEPTION TO THE ALJ'S DECISION PRECLUDING IT FROM ADDING NEW UNTIMELY OBJECTIONS REGARDING ALLEGED INTERROGATIONS AND INDUCEMENTS MUST BE DISMISSED BECAUSE THE ALLEGATIONS ARE NOT REASONABLY ENCOMPASSED WITHIN THE SCOPE OF THE UNION'S ORIGINAL OBJECTIONS.

The Union filed two Exceptions to Judge Green's decision that the Union's allegations regarding promises of benefits to employees during the critical period and alleged interrogations conducted by Vertis managers with employees were not reasonably encompassed within the scope of the Union's initial specific objections that were the subject of the hearing set by the Regional Director. The Union contends that it can introduce, and the Board must consider, evidence of alleged inducements of working conditions and other indirect and direct benefits even though the only objection it filed was to a specific promise of wage increase. Similarly, the Union claims that its assertions on the interrogations should be included as part of its Objection No. 10 which alleged that Vertis' attorney interrogated employees unidentified by the Union. The facts and the law establish otherwise.

Union's Objection No 7 states:

> The Petitioner contends that, on both the day prior to and the day of the election, the Employer delivered objectionable campaign promises *to provide pay raises* to employees if the employees voted against the Petitioner in the election. Petitioner asserts that employee Brian Becker, allegedly speaking on behalf of management, told employees that Vertis would promise *a 5% pay raise* in the next year. Petitioner also asserts that in addition, prior to the election, all employees were made to view a streaming video from the Vertis CEO who offered *merit increases in 2012*, but based on what was happening, could not promise it (suggesting that merit increases were tied to voting for the Union).

(emphasis supplied)

There is no mention of other inducements or benefits in this or any other Objection. The Regional Directors Report mirrors this allegation. (Tr. 208).[3] At the hearing, the Union attempted to adduce evidence that Vertis made other changes in working conditions and benefits which were allegedly improper inducements. (See Union Ex. 16). At the time, Judge Green stated the subject of new benefits was outside the scope of the Union's actual objection: "There [sic] are kind of allegations related to either granting or promising some benefits, apart from the wage -- the merit wage increase." (Tr. 326).

Union Objection 10 states:

> The Petitioner contends that the Employer, *by its attorney, John Gilman*, interrogated eligible employees regarding their Union sympathies during the election. Petitioner asserts that before the second round of voting, Employer's attorney Gilman complained to the Board Agent that the Union had objected to two employees solely because they were "anti – Union" voters. At that point, Gilman was asked by Petitioner's organizer Rick Putman how he knew that. Putman also asked *Gilman if he had been interrogating employees* regarding their Union sympathies (during the break between the first voting session and the second voting session). Gilman allegedly responded: "I am allowed to talk to my employees, I am allowed."

(emphasis supplied).

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[3] Vertis also objected to and moved to strike and exclude any prior or future testimony concerning alleged changes in terms and conditions of employment or promises of them, aside from promised wage increases, which were the subject of the Union's objections. These objections were formalized in a position statement that was filed with Judge Green.

The Union attempted to introduce testimony from Wilson Echeverry, who claimed to have been questioned sometime either prior to or after the election day by Vertis managers Steve Flood and John Geiger. In response, as Echeverry was leaving the stand, Judge Green noted: "I don't mean to be a pill but this is not part of the objections . . ." (Tr. 257). Also the Union called Edward Pineda, an eligible employee who testified that at some unspecified time, his supervisor asked him whether he was in favor or not in favor of the Union. (Tr. 321). Vertis' counsel again objected and noted that the Company would promptly file a related position statement on the inadmissibility of such evidence.[4]

1. The Hearing Officer has Authority To Consider Only Those Objections That Are Timely Raised, Included in the Regional Director's Report, Or Reasonably Encompassed Within the Scope of the Objections Set for Hearing By The Regional Director.

"The parameters of the hearing on objections/challenges are the Regional Director's Supplemental Decision or Report on Objections/Challenges or Notice of Hearing, which sets forth the objectionable conduct asserted and/or the challenges in issue." Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings (2003), at 141. Under well-settled Board law, "[t]he hearing officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director." NLRB Case Handling Manual, Part 2, § 11424.3(b) (August 2007) (emphasis added).

> Allegations based on a new legal theory or different factual circumstances are insufficiently related to the objections set by the Regional Director for hearing. Precision Products Group, Inc., 319 NLRB 640 (1995); Iowa Lamb Corp., 275 NLRB 185 (1985).

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[4] "I was going to make that point . . ." (Tr. 257). "We'll file a position paper." (Tr. 325). "Your honor, obviously our position is that the evidence here today -- most of the evidence here doesn't even relate to an objection." (Tr. 326).

Id. (emphasis added).

As the Board noted in Factor Sales, 347 NLRB 747 (2006),

> Consideration of issues not *explicitly stated or reasonably encompassed* in the objections constitutes a denial of due process since the wording of the Objection[s] fail to provide the meaningful notice and . . . full and fair opportunity to litigate that are the fundamental requirements of procedural due process. Lamar Advertising of Hartford, 343 NLRB 261, 266 (2004). To be meaningful, the notice must provide a party with a "clear statement" of the accusation against it. Id. (emphasis added). "It is axiomatic that a [party] cannot fully and fairly litigate a matter unless it knows what the accusation is." Champion International Corp., 339 NLRB 672, 673 (2003).

Id. at 747-48. (emphasis supplied). The purpose of this standard is to ensure that all parties have a full opportunity to know the basis of a party's objection, as an "objecting party normally should not be permitted to 'piecemeal' the submission of evidence but should be required to disclose promptly all the evidence in support of its objections." NLRB Case Handling Manual, § 11392.6 Duty to Timely Furnish Evidence. The failure to provide sufficient evidence in a timely manner results in the Regional Director having the authority to overrule the objection. Id.; Star Video Entertainment L.P., 290 NLRB 1010 (1988).

In addition to providing fairness, the Board also seeks an expeditious process in resolving any objections so that an election can be concluded. For instance, any objection "must contain a short statement of the reasons therefor... [t]he statement should be specific, not conclusionary...objections which are nonspecific, for example, which allege "by these and other acts, etc.," are insufficient, should not be treated and should be dismissed on their face." NLRB Case Handling Manual, § 11392.5, Reasons for Objections. A non-specific or even complicated objection frustrates the election process and delays an election for what could ultimately be an unsupported charge. Similarly, permitting a party to file non specific or add to objections will delay final resolution of the election.

2. The Union's New Untimely Objections Are Not Reasonably Encompassed By Its Earlier Objections.

It is undisputed that the Union did not raise an objection to the Regional Director that Vertis made unlawful promises of benefits during the critical period as required. Likewise, the Union failed to raise any issue to the Regional Director regarding high ranking officials or supervisors from Vertis interrogating two employees at some unknown period of time during the critical period.

It also is undisputed that the Regional Director's Supplemental Decision or Report on Objections/Challenges or Notice of Hearing ("RD's Report") does not list an objection that Vertis provided benefits during the critical period, and there is no mention of Vertis' managers interrogation of any employee. (RD's Report). To the contrary, it is undisputed that the Union raised these allegations for the first time in the middle of the hearing.

The Union contends that Judge Green erred in applying the "reasonably encompassed standard" adopted by the Board. (See Union's Brief at 34-35). For support, the Union cites Sawyer Lumber Co., 326 NLRB 1331 (1998); J & D Transportation, Case No. 22-RC-13090 (July 22, 2010) and Santa Rosa Memorial Hospital, 20-RC-18241 (May 28, 2010).[5] The authorities relied upon by the Union all involve instances in which stated objections concerning the election-day misconduct of a Board Agent or a union observer were amplified with additional

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[5] In reporting the proper standard for review, the Union has cited the case of Iowa Lamb Corp., 275 NLRB 185 (1985). The Union claims that Iowa Lamb stands for the proposition that a party can assert new allegations predicated on an already-stated objection so long as the new matter is not "wholly unrelated" to the original objection. Although Iowa Lamb reversed a hearing examiner for setting aside an election based on an objection that was "wholly unrelated to the issues set for hearing," id. at 185, it did not purport to prescribe a rigid future requirement with such language. Moreover, as reflected in the authorities cited above, the Iowa Lamb language has been supplemented and eclipsed by a test of whether or not the new matter is "reasonably encompassed" by an earlier stated objection, which provides a more practicable standard. As the Supreme Court has noted, a test of whether matters are related in any way, or are wholly unrelated, "is doomed to failure, since as many a curbstone philosopher has observed, everything is related to everything else." De Buono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806, 813 and n.7 (1997). In any case, even under a "wholly unrelated to" test, the Union's new allegations are too far removed from their earlier accusations to be permitted, as shown above.

evidence of misconduct by those same specific individuals on those same specific occasions.[6] For instance, in Sawyer Lumber Co., the employer raised an objection relating to the alleged misconduct of the Board Agent.[7] Id. at 1331. Specifically, the employer raised objections regarding the Board Agent's misconduct that allegedly affected the "integrity of the election process", including permitting "the election observers to take four breaks during the election and took one break himself, thereby exposing the ballot box and the blank ballots to tampering, and further, that the Petitioner's election observer talked with employees who were eligible to vote during one of the breaks." Id. The employer then raised another untimely objection: "le[aving] the blank ballots resting on the table where...[they could be] subject to tampering." Id. at 1332. Clearly, the Board Agent's misconduct in leaving the blank ballots on the table while on a break and leaving them exposed is similar to leaving the blank ballots exposed on the table while sitting at the table. The Board concluded without explanation that the new allegation was "sufficiently related" to the employers objection to warrant consideration. Id.; see also ALJD, at at 11.

The Union's argument that its attempt to introduce evidence of inducements other than pay raises as encompassed in Objection No. 7 similar to the facts in Sawyer Lumber is conclusory and ignores the facts of that case. In the present matter, the inducements are not even related to a pay raise. The Union contends that because the CEO made statements

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[6] Judge Green noted that in all of these cases "the receipt of new evidence did not prejudice the party objecting to the evidence because it did not affect the outcome of the case (i.e., the employer's objections were all overruled). (ALJD, at 11.)

[7] Although Vertis' analysis is based on the facts of Sawyer Lumber Co., 326 NLRB 1331 (1998) (Board agent misconduct). The facts of the other two cases are analogous. J&D Transportation, Case No. 22-RC-13090 (July 22, 2010) (union election observer misconduct) and Santa Rosa Memorial Hospital, 20-RC-18241 (May 28, 2010) (Board Agent misconduct); see also Judge Green's Decision ("As in J&D and Sawyer, the unalleged evidence in [Santa Rosa] was received because it obviously was closely related to the same transaction and by the same persons who allegedly engaged in the misconduct that was alleged [in] the original objections.").

promising other benefits in the same communication [i.e., the meeting two days prior to election], it can expand Objection 7 to include them. (See Union's Brief at 34-35). That is not correct. Union Ex 2 contains the statements of the CEO. There are no promises of benefits in that exhibit other than a pay raise which Vertis has decided to provide to all employees in all facilities prior to knowledge of union activity in Monroe. The Union also claims that the CEO stated; "Items on my list are on the posted action item list today". (See Union Ex. 2, page 5). The posted list refers to Union Ex 16. The objection in Sawyer Lumber was that the Board Agent engaged in misconduct with respect to mishandling the ballot box exposing ballots to tampering. Id. at 1331. The Board considered the additional allegation that the Board agent left blank ballots on the table near the ballot box unattended. Id. at 1332. This is the same conduct involving the specific subject of ballots. The allegations concerning inducements in the present matter introduce totally different subjects, unrelated in type or any other matter to a pay raise. To litigate them fairly in the hearing would require witnesses familiar with all of the pre petition conditions upon which Vertis made decisions with respect to those changes identified in Union Ex 16, and pre petition communications with employees about them. Quite simply, the alleged statements by the Vertis employee about anticipated wage increases if the Union lost, and alleged earlier video statements by the company CEO about merit pay increases, do not reasonably subsume or pertain to different newly-alleged promises about different other terms, conditions and benefits of employment.

The Union also points to Santa Rosa Memorial Hospital, 20-RC-18241 (May 28, 2010) to support its claim. In Santa Rosa, the employer's objection was that the "Board Agents failed to monitor and prevent improper conduct by employees in the voting area" slip op. at 16 n.23. The

ALJ allowed litigation and considered two additional examples of the same conduct by the Board agent. In the instant matter, the Union is attempting to litigate completely different allegations.

The present matter aligned with the facts in Towne Bus LLC, 350 NLRB at 1253-1254 n. 8, where the Board concluded that the Union's newly filed objection that the employer changed the working conditions (relating to a "charter posting procedure") was not reasonably encompassed by the original objection of the employer "promis[ing] and grant[ing] benefits to its employees to induce them to vote against [the Union]" based upon a new employee manual (i.e., one allegation about critical-period improvements does not encompass others).

Moreover, if the Union was sufficiently aware of the statement of pay raises made by the CEO in this same presentation (Union Ex 2, p.7), it was also aware of his statement concerning items on the list. The failure of the Union to include any allegation on other promises or inducements is not consistent with its duty to "disclose promptly all the evidence in support of its objections." NLRB Case Handling Manual, § 11392.6 Duty to Timely Furnish Evidence.

Even more unavailing is the Union's argument regarding Objection No. 10. The Union contends that "[t]he alleged conduct and the unalleged evidence both involve interrogations of employees about their support for the Union." (See Union's Brief at 39). The alleged instances of purported interrogation by a Vertis lawyer to employees on election-day do not reasonably encompass or relate to alleged instances of different interrogations by different company personnel directed at different company personnel on different occasions. See Factor Sales, 347 NLRB at 748 (concluding that an objection to an employer's improperly inhibiting off-duty employees from talking to union representatives did not encompass new claims involving employer's inhibiting on-duty employees through an overbroad "no talking rule" and surveillance of them by company security guards. (*i.e.*, one allegation about "no talking"

restrictions on some employees does not encompass other instances with other employees)). Because the Union's new claims are "based on . . . different factual circumstances, [they] are insufficiently related to the objections set by the Regional Director for hearing." NLRB Case Handling Manual, Part 2, at § 11424.3(b).

The Board's cases clearly prohibit the substantial shifts in position attempted by the Union through its newly-stated objections. See 2 Sisters Food Group, Inc., Case Nos. 21-CA-39815 and 21-CA-38932 (NLRB Div. of Judges, June 10, 2010), slip op. at 21 (refusing to consider new allegations by a union that the Board agent improperly engaged in a pre-election-day tour of the employer's facility as pertaining to the union's earlier objection that it was improperly denied a pre-election tour); see also Factor Sales, supra and Towne Bus LLC, supra. Accordingly, the Board should refuse to consider the Union's new allegations regarding alleged promises, inducement and interrogations.

3. The Union Failed To Raise The New Allegations In Any Timely Objection And The New Allegations Are Not Included In The Regional Director's Report on Challenges and Objections.

The Union contends that Vertis had "full opportunity" to litigate the new allegations because Vertis was put on notice when (1) the Union offered evidence relating to the CEO's statements regarding promised wage increase; and (2) the Union asserted an objection that the issue of interrogations would be in dispute. (See Union's Brief at 35, 39). The Union provides no case support for this claim. Since the Union failed to include them in its Objections, counsel for Vertis had no opportunity in advance to investigate the Union's new allegations, confer with the newly-named Company agents who supposedly engaged in the newly alleged interrogations, to seek and prepare witnesses on the issues, or to cross-examine thoroughly. Moreover, on the issue of benefits and workplace improvements, Vertis should not have been obligated to review all of the policy changes that the Company implemented within the last year, just because there

was an objection regarding an unrelated merit wage increase. A policy implementing the investigation of an offline proofing system does not have anything to do with a merit wage increase. (Union's Exhibit 16, #25). Clearly these objections failed to provide "the meaningful notice and . . . full and fair opportunity to litigate that are the fundamental requirements of procedural due process." Lamar Advertising of Hartford, 343 NLRB 261, 266 (2004). Even if the issue had been fully litigated, it still would have to be disregarded. Reno Hilton, 319 NLRB 1154, 1191 n. 26 (1995) ("I decline to consider the question of the alleged late-filed Excelsior list, because that issue was not the subject of a separate objection and because I am not aware how the issue is reasonably encompassed within the instant objection, even though it may have been litigated.").

4. The Union's Attempts To Reinvent Its Objections Regarding Inducements and Interrogations Fail On Their Merits.

In addition to being procedurally improper, the Union's attempts to re-invent its prior objections with entirely new untimely objections concerning interrogation of employees, bestowal of new non-wage terms, and conditions and benefits of employment fail on their merits.

There is no evidence in the record that the Company decided to implement any of the alleged inducements after the Union filed the petition. The items on the action list, Union Ex 16 were the result of pre-petition decisions by Vertis. (See Tr. 399-400).

Harper testified that she was unsure of whether 4 of 37 items on the action list Union Ex 16 were items on which the Company had determined to take action on prior to the filing of the Petition. (Tr. 400, 428). She also stated that Vertis was taking action on the remaining 33 items prior to the filing of the Petition. Id. The four items which Harper testified were either new or not sure were decided prior to the petition including an item to hire a manufacturing manager to replace McGuigan (No. 9); scheduling an job related event in a specific press area (No 26);

create better communication around job posting process (No. 35) and implement new hire welcome breakfast meeting. (No. 42). None of these items is a material inducement that reasonably would have affected eligible voters. The Union did not produce any witnesses who testified about this list, and it did not identify any other "inducements or benefits" upon which it was basing its new allegations. In the present matter, the improvements referenced in Exhibit 16 were identified and previously discussed with employees by CEO Sokol. Harper testified without contradiction that the improvements were the results of complaints received by plant employees prior to the petition and the Company decided to take action on them prior to its knowledge of the Union's petition. (Tr. 395-399, 401).

Quite simply, Vertis was lawfully permitted to make the changes after the Union petition was filed as the Company was committed to the ongoing process of making improvements. See LRM Packaging, Inc., 308 NLRB 829 (1992) (Board held that "the grant of medical benefits was promised and set into motion before the union campaign, the statement regarding those benefits was simply a reaffirmation of plans announced before the union campaign."); see also Litton Dental Prod. v. NLRB, 543 F.2d 1085, 186-188 (4th Cir. 1976) (Court held company's action of reinstituting coffee breaks and other benefits after complaints by employees were lawful even though a demand for Union recognition had been filed. The Court found that while the changes had not been instituted at the time of the Union's recognition "improvement had begun, was afoot and well on the way to consummation prior to the appearance of any prospect of unionization." The Court held that the Board failed to provide evidence that the "restorative acts of the company were undertaken to sway employees in accepting or rejecting union organization.") Moreover, the fact that Vertis repeated its announcements after the Union petition had been filed is of no consequence, especially considering the fact that this identical

announcement was made prior to any knowledge of union organizing. Louisiana Plastics, Inc., 173 NLRB 1427, 1428 (1968) (Despite the president of the company making statements regarding wages after the Union petition was filed, the Board found that his statements were lawful. Prior to the Union petition being filed, the president made certain assessments regarding wages to his employees at an annual Christmas party and then repeated his assessments and the Company's plan after the petition had been filed. The Board held "that the president of the company , we do not view Respondent's pre-election promises as coercive or as otherwise destructive of a free election choice. In essence, Respondent merely restated what it had said in the past, that it granted annual wage increases.")

The Union's reliance on St. Francis Fed'n Nurses & Health Prof'ls v. NLRB, 729 F.2d 844 (D.C. Cir. 1984) is misplaced. In St. Francis, the new administrator for the employer decided to raise wages after he knew the Union's petition for an election was filed. While the employer did have a legitimate reason for the raise (i.e., other hospitals in Milwaukee had started to increase wages), the timing of the announcement, two weeks before the election was deemed a violation of the Act. Id. at 850-852. This case is not striking similar as the Union contends. None of the cases cited by the Union have facts which remotely resemble the instant matter. Contrary to the Union's allegation, Vertis made the decision and was in the process of implementing these changes before the petition was even filed. See Co. Ex. 2.

Likewise, there is no support for the Union's contentions that the alleged interrogations destroyed the laboratory conditions necessary for a free and fair election. The only evidence in support of the Union's allegations on the interrogations is the vague and inconsistent testimony of two individuals. Wilson Echeverry, a stipulated bargaining unit employee, alleges that Vertis Manager Steve Flood asked Echeverry what he thinks about the Union. (Tr. 244:24-25; 245:1-

7). Echeverry's testimony is inconsistent as to the timing of Flood's alleged inquiry, which, according to Echeverry, could have been "before the elections," "within the week" of the Union's filing of the Petition, or "the first day after elections." (Tr. 245:3-4; 246:3-25; 247:1-8; 255:21-25; 256:1-9). Echeverry also testified that another manager John Geiger asked Echeverry at some unidentified place and time in August before the election, "[W]hat are you rethinking about all this, about the Union stuff?" (Tr. 243:18-25; 244:1-9; 256:10-14). Echeverry's testimony on these and other matters is unclear and unreliable as demonstrated by his own descriptions on the timing of the alleged polling. [8] Echeverry further testified that his conversations with Flood and Geiger did not change his opinion or support of the Union:

Q: . . . . Now, you were in favor of the Union?

A: Yes, I am.

Q: You were? And did the conversation with Mr. Geiger change your opinion about the Union?

A: No.

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[8] In fact, Echeverry admitted on cross examination that during this period of time, he announced to fellow employees that he believed the world would end, and management referred him to Vertis' Employee Assistance Program:

Q: Mr. Echeverry, during this period of time did you tell somebody at the plant that you thought the world would end?
A: I'm sorry?
Q: Did you tell somebody in the plant that you thought the world would end?
A: I'm sorry, I don't understand the question.
Q: Did you tell anybody in the plant that you thought the world would end?
A: Oh, yes, yes.
Q: You did?
A: Yes.

(Tr. 252:21-25; 253:1-25; 254:1-2).

Q: Did the conversation with Mr. Flood change your opinion about the Union?

A: No. (Tr. 257:5-12).

Pinaha, a stipulated bargaining unit employee, testified that his supervisor, Mahesh Pophaly, asked Pinaha during the critical period "was I in favor of the Union or not in favor of the Union." (Tr. 305:16-25; 306:1-13). Pinaha further testified that this alleged inquiry of Pophaly did not influence his vote in the election. (Tr. 311:1-17).

As noted above, Echeverry's equivocal testimony was too vague, ambiguous and inconsistent to be credible. It is also refuted by other Union called witnesses who stated that the Company management simply sought to engage in amicable pleasantries with employees. (See union witness testimony at Tr. 303: 2-19) ("Mostly Steve was coming around being very nice, and shaking hands, and talking and, you know, he never really dissuaded the vote either way."). Because Echeverry was unable to recall whether his alleged discussion with Flood occurred prior to or after the election, that incident fails to prove interrogation which properly could warrant setting aside the election, since if it occurred after the election, it could have no effect whatever of interfering with employee free choice in voting. Local 299, Int'l Brotherhood of Teamsters, 328 NLRB 178 (1999) (alleged interchange "could not have constituted interference, inhibiting or affecting [employee's] vote since he had already voted at the time that these remarks were made.") The Geiger inquiry, which Echeverry only identified as occurring at some point in August, has not been specifically shown to be sufficiently proximate to the actual election date of August 31 to have had likely impact.

The few instances of alleged interrogation were too incidental and bland to be unlawful. Interrogation is not per se illegal but must be shown to be coercive and threatening under the

totality of the circumstances. Rossmore House, 269 NLRB 1176, 1177 (1984). The alleged incidents were nothing more than three non-coercive and non-argumentative inquiries, which were quick, unsystematic, general and non-accusatory. Even as portrayed by Echeverry, the inquiries were stated in the most casual and friendly terms, suggesting no motivation to coerce or retaliate but rather simply to know how workers felt: "What did I think about the union . . . about the union stuff?" (Tr. 243-244). They all occurred in passing out in the open on the shop floor. As such, they were not unlawful at all and in all events too isolated, incidental and de minimis to warrant setting aside the election. If a party raises allegations of interrogations that are too isolated, incidental, and de minimis, then the conduct will be considered insufficient to set aside an election. United Mercantile, 204 NLRB 663, 669 (1984) (Even if allegations of interrogations were true, the Board held that the conversations were isolated, de minimus[sic], and remote...[and as a result] the conduct did not interfere with the employees exercise of a free choice in the election.); Coca-Cola Bottling Co., 232 NLRB 717, 718 (1977) (Interrogations affected "only two out of a total compliment of 106 eligible voters" and therefore, the "conduct represented isolated incidents which are insufficient to affect the results of the election.")..

In support of its allegations, the Union cites non- election cases that simply discuss the rule that "whether under all the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act." Bloomfield Heal Care Center, 352 NLRB 252, 253 (2008) (decided by only two members and abrogated by New Process Steel v. NLRB, 130 S. Ct. 2635 (2010)). In Bloomfield, the Board held that highest ranking official's questioning of several employees about whether they attended union meetings and what happened at the meeting was violation of the Act. In Stevens Creek Chrysler Jeep Dodge, 2011 NLRB LEXIS 470, *28-29 (2011), the Board concluded that supervisor unlawfully interrogated four of only

thirteen employees in his office and asked them whether they attended the union meeting and signed cards, and threatened one of the employees during the interrogation that his pay would be cut if employees selected the Union. Finally, in Multi-Ad Services, Inc., 331 NLRB 1226, 1227 (2000), the Board held that plant manager engaged in unlawful interrogation when he asked employee about potential job promotion not long after asking the employee his reasons for supporting union. The facts of each of these cases markedly differs from those in the record in this case, where there is material evidence of only one alleged interrogation during the pre-election period.

The Union's claims of interrogations are devoid of any support in the record, save these few sporadic alleged interrogations, which are not sufficient to overturn the election.

IV. CONCLUSION

For the aforegoing reasons and those set forth in the Employer's Brief, Vertis respectfully requests that the Board overrule the Union's challenges to the ballots of Swercheck and Diaz order that they be opened and counted. In addition, Vertis respectfully requests that the Board deny all of the Union's Exceptions and adopt Judge Green's dismissal of each of the Union's Objections.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of January 2012 a true and correct copy of the foregoing Brief of Vertis, Inc. was served via overnight and electronic mail on the following:

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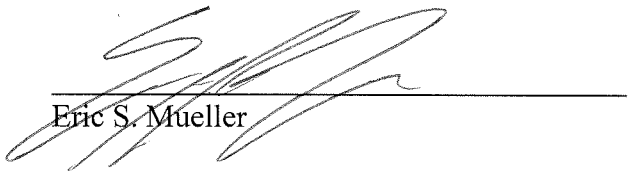

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